IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.55 OF 2004

AND

CONTEMPT PETITION NO.15 OF 2002

IN

APPEAL NO.220 OF 1997

IN

NOTICE OF MOTION NO.2317 OF 1992

IN

SUIT NO.2632 OF 1992

Daruwalawadi Co-op.Housing Society. ...Petitioner

vs.

Pukhraj Chunilal Bafna & others. ...Respondents

Mr.B.D.Joshi i/b. Divya Shah Associates, for Petitioner.

Mr.R.S.Jaisinghani i/b. Basant Tilokani & co., for Respondent no.1.

Mr.F.D'Vitre with M.S.Doctor i/b. D.G.Rangras, for Respondent nos.3 & 12.

Mr.P.K.Dhakephalkar i/b. Amit Sheth, for Respondent nos. 4 to 10.

Mr.J.P.Shah i/b. J.P.S.Legal, for Respondent no.12.

CORAM: D.K.DESHMUKH,J.

DATED: 18th April,2007

P.C.:-

1. By this contempt petition, the petitioner alleges that the respondents have committed willful breach of the order dated 20.1.1997 passed by the learned single Judge of this Court in notice of motion no.2317 of 1992. They also alleged that the respondent no.3 has also committed breach of the undertaking given by it before the Appeal Court in the Appeal no.220 of 1997, pursuant to which order dated 17.4.1997 came to be passed.

2. The facts which are material and relevant are that the petitioner is the plaintiff in Civil

Suit no.2632 of 1992. The present respondent no. 3 was defendant no.3 in the suit. In that suit, a notice of motion being Notice of Motion no.2317 of 1992 was taken out, that notice of motion was decided by the learned Single Judge of this Court by order dated 20.1.1997. The operative part of that order reads as under:-

> "If the defendants are allowed to construct upon the property, the suit would practically become infructuous. There are serious issued involved in the present suit which can be decided only at the time of trial. Till then both the parties are liable to maintain status quo. Accordingly, it is ordered that both the Plaintiff and the defendants shall maintain status quo in respect of open land in plot "A" pending the hearing and final disposal of the suit. Needless to mention that the parties are also prevented from creating any third party rights. The defendant no.3 will be at liberty to apply for revalidation of the commencement certificate. Notice of motion disposed of accordingly."

The learned single Judge has thus observed that if the defendants are allowed to construct on the property, the suit would become infructuous. There are serious issues involved in the suit and therefore, during the pendency of the suit parties should maintain status quo and both the parties were restrained from creating third party rights. An appeal was carried against this order. Before the Appeal Court, an undertaking was filed on behalf of the defendant no.3. The undertaking was "not to create any third party rights in the property in question and /or transfer any constructed portion of the building to any party without the orders of the Court”. So also, the learned Counsel for defendant no.3 has made statement that the appellants would not claim any equity on the ground that the construction had been undertaken by the appellants and that this appellants will not part with possession of the property to anybody in any manner." Thus the undertaking was that the third defendant will not create any third party rights and will also not part with possession of the property. According to the averments in the petition, a chamber summons

was taken out by the present respondent nos. 4 to 12 in this Court in the Civil Suit for being joined as parties to the Civil Suit because according to the respondent nos.4 to 12, the respondent no.3 before the order was made by the learned Single Judge, had allotted flats in the building to them and that according to them they had also taken possession of those flats from the contractor who was appointed by defendant no.3. It appears that the contractor who was appointed by defendant no.3 was joined as defendant no.13 to this suit. This Court on 27.2.2003 made an order directing the petitioner to delete the name of the respondent no.13. This order has become final. This order has not been challenged either by filing an appeal even an application for review of that order has never been filed. What has been done is that a chamber summons has been taken out being chamber summons no.55 of 2004 for permission to join original respondent no.13 as respondent no.14. Obviously, this chamber summons cannot be entertain by the Court as the Court by the speaking order dated 27.2.2003 has directed deletion of respondent no.13 as respondent. The chamber summons no.55 of

2004, therefore, is not maintainable and therefore, is rejected.

3. According to the averments made in the petition, the case of the petitioner is that when the order was passed by the learned Single Judge and when the undertaking was given before the Division Bench, there were no allotment of the flats made. The allotment of flats was made subsequently but the allotment letters were ante-dated. Thus, according to the petitioner, the allotment of the flats has been made subsequent to the order of the learned Single judge and the undertaking given before the Appeal Court. On being asked as to why the petitioner claims that the allotment letters have been ante-dated, the learned Counsel submitted that when defendant nos.4 to 12 had filed a civil suit in the City Civil Court at the time when the ad-interim order was passed in their favour by the City Civil Court the defendant no.3 who was defendant before the City Civil Court did not point out to the City Civil court that the civil suit in this Court is pending. However the record shows that in fact an affidavit

was filed before the Civil Court Court on behalf of defendant no.3 pointing out that the civil suit in this Court is pending, copies of all the papers were also produced and it is therefore that the respondent nos.4 to 12 moved a chamber summons before this Court for being joined as defendants in that suit. In my opinion, from the alleged conduct of the defendant no.3 of not pointing out to the Civil Court at the time when it passed an ad-interim order that the civil suit in this Court is pending, an inference can not be drawn and on the basis of such an inference a conclusion can not be recorded that the respondent no.3 has ante-dated allotment letters. Even if it is assumed that the defendant no.3 did not point out to the City Civil Court when it had passed the ad-interim order in favour of respondent nos.4 to 12 that the civil suit in this court is pending, in order to find out whether an inference can be drawn that the allotment letters in favour of respondent nos. 4 to 12 have been ante-dated by defendant no.3, the record of the case will have to be examined. One of the Directors of the defendant no.3 by name Prithviraj P.Kanungo -respondent no.14 has filed an

affidavit in this Court dated 9.6.2004. In that affidavit, the respondent no.14 in ground no.17 has stated thus:-

> “xvii) I further submit that even after the order dated 20/01/1997 was passed by His Lordship Mr.Justice A.P.Shah the Respondent no.3 mentioned in the ground of appeal that the third party rights had been created prior to the order passed by his Lordship Mr.Justice A.P.Shah. I say that ground of Appeal No.31 mentioned in the said facts is reproduced as under:-
> “The learned Single Judge has completely ignored the balance of convenience and the equities in the matter and has failed to appreciate that substantial costs and labour were incurred in securing building permissions, allotments of some of the flats and liability to provide flats to B.H.A.D.A. And the B.M.C. Nominees from the proposed construction whereas Respondent no.1 having received free of cost for its members valuable premises the Respondent no.1 ought not to be

> permitted to construct the construction being carried on by the Respondent no.3 herein."

On behalf of the petitioner, a rejoinder has been filed to the affidavit dated 9.6.2004 of the respondent no.14. In paragraph 7 the petitioner states that neither the learned Single Judge at or any time before the order dated 20.1.1997 was passed nor the Appeal Court was informed that third party rights were created. But the petitioner does not deny that in the appeal that was filed before the Division Bench against the order of the learned Single Judge, the ground was taken that third party rights have already been created and the flats have been allotted. Therefore, it is possible that the present respondent no.3 had pointed out at least to the Appeal Court where the undertaking was given that the flats have been allotted. In my opinion, therefore, solely on the basis of the alleged conduct of the respondent no.3 of not pointing out the pendency of the civil suit in this Court at the time when the City Civil Court passed the ad-interim order, an inference that the allotment letters are ante-dated

so that the order made by this Court can be circumvented cannot be drawn specially because drawing of such inference would entail taking quasi criminal action against respondent no.3 and 4 to 12. In my opinion, thus, as it cannot be said with any degree of certainty that the third party rights were not created before the undertaking was given before the Appeal Court, it cannot be said that the respondents have willfully violated the order made by the learned Single Judge or the undertaking given before the Division Bench.

4. According to the petitioner, the respondents have also violated that part of the undertaking where the defendant no.3 undertook not to part with possession of the flats. According to the petitioner, possession was taken by the flat purchasers from the contractor original defendant no.13. According to the affidavit filed on behalf of the flat purchasers i.e. the affidavit of Mrs.Savita A. Mehta dated 5.4.2004, the respondent no.3 had allotted the flats to respondent nos. 4 to 12. The building was partially completed. The respondent no.3 was claiming

escalated cost of construction from them and was not completing the remaining work and was not handing over possession, therefore, the association of the flat purchasers engaged original respondent no.13 Contractor on 25.10.2000 for completing the remaining work on payment of Rs.20 lakhs and on his completing the work he handed over possession of the flats to the flat purchasers. Even, according to the averments in the petition, the possession of the flats was taken by the flat purchasers from the contractor. It was submitted before me that the respondent no.3, the contractor respondent no.13 and the flat purchasers were in collision and thus, in fact the possession was handed over by the respondent no.3 to the flat purchasers in breach of the undertaking given to the Court. But for examining this allegation of collision, the respondent no.13 will have to be heard. In other words, the findings that there was a collision between the respondent no.3 and the contractor and the flat purchasers, the respondent no.13 is a necessary party and as the respondent no.13 contractor is no more a party to this petition, I cannot even proceed to examine the correctness or

otherwise of the submission. It was also pointed out that the allottees have made payment by cheque to the respondent no.3 and some of the payments have been made by the allottees by cheques before the order was made by the learned Single Judge and the undertaking was given before the Division Bench. In any case, it appears from the record that the respondent no.3 did not complete the entire building. The flat allottees therefore, formed an association and they engaged the same contractor who was engaged by the respondent no.3 to complete the remaining construction work at the cost of the flat allottees and on completion of the construction they secured possession of the flats from the contractor. Neither the contractor nor the flat purchasers are parties to the Civil Suit. In any case, undertaking that not to part with possession, is not given by any of them. Perusal of the petition shows that it is the case of the petitioner itself that issuance of the allotment letters in favour of the flat allottees does not transfer any rights in their favour. If that is so there is no question of the respondent no.3 violating the undertaking of not to create third party rights by issuing allotment

letters. Therefore, there is no question of undertaking given by the respondent no.3 being violated by the flat purchasers by taking possession from the respondent no.13 contractor.

5. So far as the respondent no.1 is concerned, admittedly, he has not given any undertaking. It is also not alleged that in the flats the respondent no.1 has created any third party rights in favour of the flat allottees or that he played any part in flat allottees getting possession of the flats. Therefore, there is no question of respondent no.1 being guilty of any civil contempt of this Court.

6. Taking overall view of the matter therefore, in view of the record as it stands none of the respondents can be held guilty of having committed civil contempt of this Court. The contempt petition is therefore, disposed of. No order as to costs.